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IN THE

Supreme Court of the United States

October Term, 1935.

No. 577.

RICKERT RICE MILLS, INC., *Petitioner*,

v.

RUFUS W. FONTENOT, Individually and as Acting United States Collector of Internal Revenue for the District of Louisiana, *Respondent*.

BRIEF AMICI CURIAE

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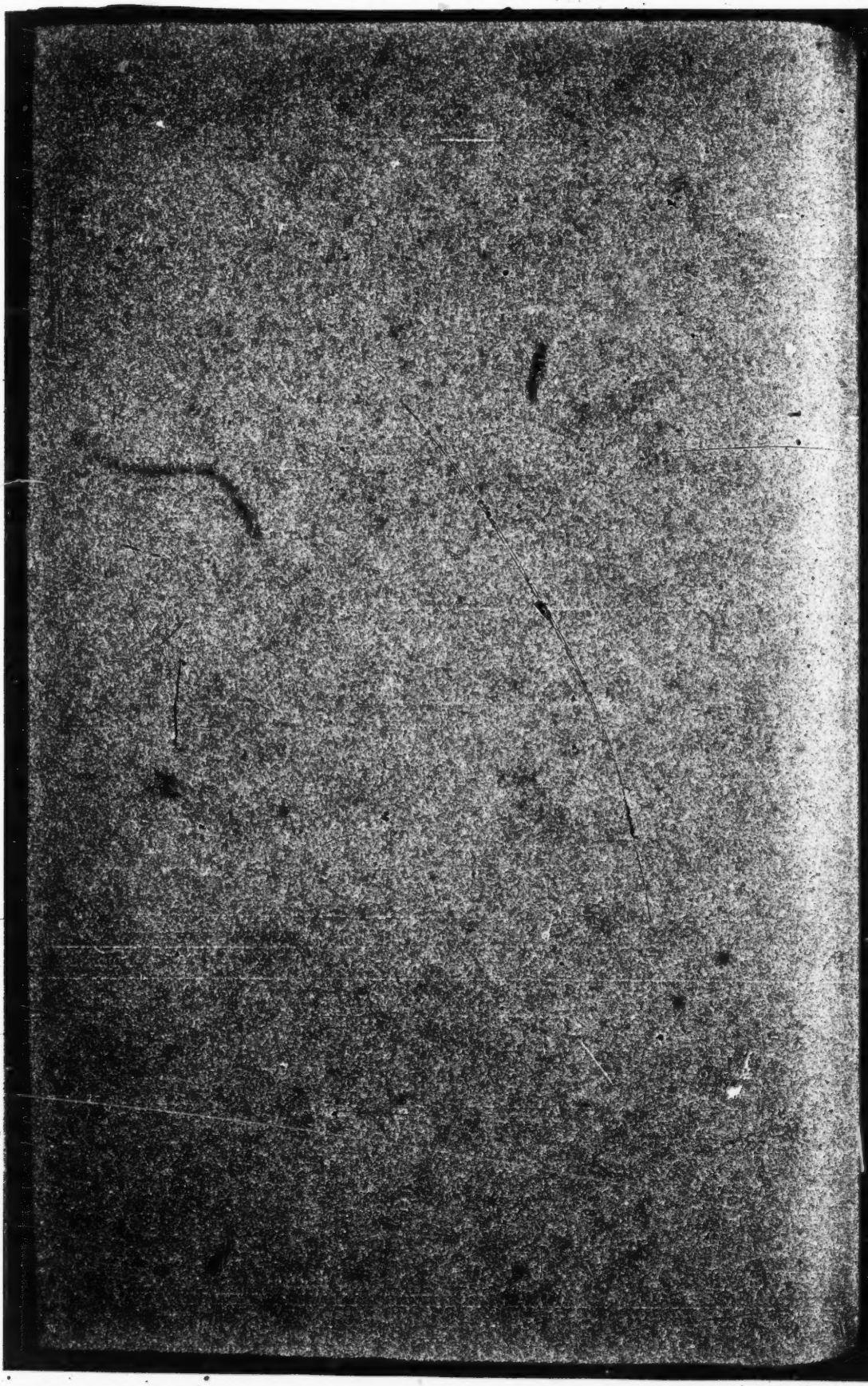

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BRIEF AMICI CURIAE

SCOPE OF BRIEF

Several briefs on file with this Court in this case and *United States of America* v. *William M. Butler, et al.* (October Term, 1935, No. 401) discuss in detail the question of the constitutionality of the Agricultural Adjustment Act both as originally enacted and as amended by H. R. 8492.[1] Other briefs herein argue that the Federal courts have not been deprived of their equitable jurisdiction by either section 3224 of the Revised Statutes or section 21(a) of the Agricultural Adjustment Act.

This brief therefore is addressed solely to the question whether the Federal courts, in the exercise of their equitable jurisdiction, should enjoin the collection of the processing taxes.

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[1]Public Laws No. 320, 74th Congress, 1st Session.

(1) Grounds for exercise of equitable jurisdiction.

In *Miller* v. *Standard Nut Margarine Co.*[2] this Court said:

> "And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case **within some acknowledged head of equity jurisprudence,** a suit may be maintained to enjoin the collector."

What, then, are some of the equitable grounds which are applicable in the case of processors of basic agricultural commodities?[3]

It is axiomatic that equity will exercise its jurisdiction where the law either provides no remedy[4] or provides a remedy that is not adequate.[5]

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[2]284 U. S. 498.

[3]While the case before this Court concerns only the rice millers, it seems reasonable to assume that the decision in this case will influence the actions of the courts below in granting or denying injunctions to thousands of processors of basic commodities other than rice. For this reason this brief occasionally makes reference to data concerning other basic commodities. The necessity for this is illustrated by the fact that only in the cotton textile industry has any governmental study been made of the effect of the processing taxes upon the industry. It is reasonable to assume, however, that the imposition of the processing tax has caused or will result in similar conditions in the industries processing other basic commodities.

[4]*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673.

[5]Corpus Juris (21 C. J. 50) succinctly states the rule as follows:

> "The existence of a remedy at law does not deprive equity of jurisdiction unless such remedy is adequate. By this is meant that it must be clear, complete, and as practical and

Over one hundred years ago this Court in *Boyce* v. *Grundy*,[6] said:

> "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical as and efficient to the ends of justice and its prompt administration, as the remedy in equity."

In *Walla Walla* v. *Walla Walla Water Company*,[7] this Court said:

> "This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. Boyce's Executors v. Grundy, 3 Pet. 210, 215; Ins. Co. v. Bailey, 13 Wall. 616, 621; Kilbourn v. Sunderland, 130 U. S. 505, 514; Tyler v. Savage, 143 U. S. 79, 95."

In recent decisions this Court has affirmed this principle. In *Stewart Dry Goods Co.* v. *Lewis*,[8] the Court said that the remedy at law must be——

> "certain, reasonably prompt, and efficacious."

In the light of the above rules enunciated by this Court, it is important and necessary to analyze and consider section 21 (d)[9] of the Agricultural Adjustment Act, as

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efficient to the ends of justice and its prompt administration as the remedy in equity, or, as it is expressed in almost innumerable cases, in order to oust equity of jurisdiction the remedy at law must be 'plain, adequate and complete.' "

[6] 3 Peters 210.

[7] 172 U. S. 1, at p. 12.

[8] 287 U. S. 9.

[9] This section is quoted at page 77 of petitioner's brief.

amended, to determine whether in the light of that section the processor has, first, any legal remedy, and second, an adequate legal remedy. It is submitted that in practical effect section 21 (d) provides no legal remedy to the taxpayer whereby if it pays processing taxes and they should be unconstitutionally or illegally collected, it could recover them from the Government. In the second place, it is submitted that if a remedy at law is provided by section 21 (d), it is entirely inadequate, in that it is neither (1) plain, certain and clear, nor (2) complete, nor (3) prompt.

(2) There is NO remedy at law.

To establish that the enacted legislation does not provide any remedy at law, we desire to review its legislative history.

On June 14, 1935, Congressman Jones, of the House Committee on Agriculture, introduced the bill, H. R. 8492, which contained a provision to the effect that no suit or proceeding should be brought in any court for the refund of any amount of tax assessed, paid, or collected, or accrued prior to the date of the adoption of the amendment. The bill contained separate provisions relating to taxes accruing after the date of adoption of the Act. The bill was reported by the Committee on Agriculture to the whole House on June 15, 1935.

On the floor of the House various committee members explained the purpose of the Amendatory Act. Mr. Pierce of Oregon a member of the Agriculture Committee, said (Congressional Record, Vol. 79, No. 125, June 18, 1935, at page 9949):

> "It is the belief of the Committee that this amendatory act will prevent suits from being filed that will have any standing in a court of law or equity. For

this one reason, if for no other, this bill should be passed now at this session."

Mr. Hope, ranking minority member of the Agriculture Committee, stated on the same day (Congressional Record, p. 9957):

"Another important provision is that which prohibits the bringing of suits for refund or credits of any tax heretofore paid."

Chairman Jones, of the Committee on Agriculture, in the Committee's report (House Report No. 1241, page 20), also stated:

"The practical effect of this provision will be to prevent any refunds of taxes already collected upon the ground that the Act or the actions of the Secretary thereunder are illegal."

The bill was passed by the House of Representatives on June 18, 1935, and was introduced in the Senate on June 19, and referred to the Committee on Agriculture and Forestry. On July 3, the Senate Committee on Agriculture and Forestry reported the bill to the Senate with an even more drastic provision that the courts should not have jurisdiction of any suits to obtain refunds of taxes assessed, paid, collected, or accrued prior to the adoption of the amendment.

Senator Smith, Chairman of the Senate Committee on Agriculture and Forestry, in his report to the Senate (Senate Report No. 1011, p. 22) stated:

"The practical effect of this provision will be to prevent any refunds of taxes already collected upon the ground that the Act or the actions of the Secretary thereunder are illegal."

On the floor of the Senate (Congressional Record, Vol. 79, No. 147, July 18, 1935, p. 11857) a group of Senators led by Senator George of Georgia, Senator Borah of Idaho, Senator Norris of Nebraska, Senator Johnson of California, and Senator Gore of Oklahoma objected to the provision on the ground that it would deprive the taxpayer of his day in court. As a result of the objection of these Senators, a more liberal amendment was inserted in the bill. This amendment was adopted by the Senate by a vote of 61 to 23 (Congressional Record Vol. 79, No. 148, July 19, 1935, p. 11924). The act, as thus amended, was passed by the Senate July 23rd, and sent to conference.

It should be noted that the Conference Committee appointed by the Senate consisted of Senators Smith, Bankhead and Murphy, representing the majority, and Senators McNary and Norris, representing the minority. Senator Smith was Chairman of the Committee which had reported the provision proposing to deprive the courts of jurisdiction to entertain suits for refund. Senators Murphy and Bankhead had both voted against Senator George's amendment, and expressed themselves on the floor of the Senate as being in favor of the Committee amendment.[1]

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[1]Senator Bankhead, on July 18, 1935 (Congressional Record, Vol. 79, No. 147, p. 11858), said:

"I am in favor of the Committee amendment."

Senator Murphy, on July 19, 1935, said (Congressional Record, Vol. 79, No. 148, p. 11921):

"It appears to me, Mr. President, that the courts should not be opened to question the raising of money or its appropriation by Congress except upon the constitutional ground that the tax is not uniform."

It would seem patent that in appointing the Senate conferees, the leaders of the Senate selected men who strongly favored the action of the House and Senate Committees, depriving taxpayers of the right to go to court, and were opposed to Senator George's more liberal amendment. Accordingly, it was to be expected that the conference report would adopt the attitude of the Committee on Agriculture. The conferees emasculated the George amendment by completely rewriting the section in the form in which it was finally enacted. The report was adopted by the House, and in turn was adopted by the Senate on August 15, 1935. On August 19, the Speaker and the Vice-President signed the bill and transmitted it to the President. The President signed the bill on August 24, 1935.

It is submitted that a review of this legislative history of the enactment of section 21 (d) discloses that from the inception of the amendments there was an admitted purpose on the part of those responsible for the legislation to prevent processors from obtaining refunds of processing taxes in the event that the statute should be declared unconstitutional or in the event that the taxes were illegally or erroneously exacted. In the first instance, the House proposed to bar suits for refund. The Senate Committee concurred in this proposed legislation. On the floor of the Senate, when objection was raised to the character of such legislation, some judicial remedy was provided for. This remedy, commonly known as the George Amendment, was effectively eliminated by the conferees in conference. Senator Borah stated with reference to the Conference report on this section :

> "That really nullifies the Senate provision." (Congressional Record, Vol. 79, No. 169, p. 13700. August 15, 1935.)

As finally enacted, section 21 (d) discloses a theoretical remedy at law, but in practical effect, it is in every way as complete a bar to suits for refund as the original House and Senate Committee provision.

It is submitted that the Court should take judicial notice of this legislative history of the adoption of section 21 (d).[2] It is apparent that it was the intent of Congress to deprive the taxpayer of all judicial remedy to obtain refunds of processing taxes unconstitutionally or illegally exacted. Mr. Justice Holmes, it should be remembered, stated in *Lash's Products Co.* v. *United States*:[3]

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co., 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all."

In the case of *Armour & Co. v. Harrison* (in the District Court of the United States for the Northern District of Illinois, Eastern Division), District Judge Barnes, on August 1, 1935, in granting a temporary injunction against the processing tax on pork, said:

> "Now, I have been considering that proposition ever since I first heard of this. I am not wholly inexperienced with the trial of law suits, and I am

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[2] *Duplex Printing Co.* v. *Deering*, 254 U. S. 445.
Texas & Pacific Railway Co. v. *Interstate Commerce Commission*, 162 U. S. 197.
Miller v. *Standard Nut Margarine Co.*, 49 Fed. (2d) 79, Aff'd 284 U. S. 498.
Hampton and L. F. Ry. Co. v. *Noel*, 300 Fed. 438.
Central Building, Loan & Savings Co. v. *Bowland*, 216 Fed. 526.

[3] 278 U. S. 175.

> familiar with the way counsel go about proving facts, and for the life of me I cannot figure out how a processor, assuming that he sells the pork and sells it for more than the amount of the processing tax, would ever be able to prove he did not pass on the tax. I have not been able to figure that out. I do not think he could. I do not think as a practical proposition he could, so I think these are just words, just words that mean nothing."

It is submitted that the language finally adopted in section 21 (d) is, as Judge Barnes stated in the above-mentioned case, "——just words." It is an attempt on the part of those responsible for the situation to overcome the effect of decisions that the statute is unconstitutional and to prevent manufacturers from recovering the taxes illegally collected from them, at the same time giving the appearance of a legal remedy in order to prevent the processors from enjoining the collection of the tax.

The processing tax is scrambled into the other costs of manufacture and no processor can determine the extent to which any one of the numerous items of cost are included in the sales price. The Commissioner of Internal Revenue in a letter dated September 25, 1934, said:

> "The processing tax attaches upon the first domestic processing of cotton and is payable by the processor. The amount paid as tax with respect to such commodity increases the cost of conducting his business and becomes an indivisible part of the production cost, similar to the manner in which other expenses such as depreciation, interest on capital invested and taxes paid to the State are incident to the conduct of a manufacturing business and enhance the cost of articles produced. The processing tax cannot be considered as a tax with respect

to any person other than the person liable to the Government for the tax.'"[4]

Sales price, on the other hand, is not determined primarily by the manufacturing costs of the particular manufacturer. It is determined by numerous factors entirely beyond the control of the processor, i.e., the economic law of supply and demand.[5]

Accordingly, the Bureau of Internal Revenue has ruled that the fact that a business is operated at a loss is not sufficient to establish that the tax has been absorbed.[6] The loss may be due to increased labor or raw material costs or to poor business management. It is thus apparent that the question of sales price is controlled by external factors and it is impossible to unscramble the sale price of an article to determine what items of manufacturing cost are included.

The problem is illustrated by assuming a case where a processor has a patent or a secret process on a particular article. It is assumed that he can sell that article for 50 cents because he has no competition and because up to that point the public will buy his article rather than do without or shift to some substitute. Consequently, the article can be sold for 50 cents whether the cost of manufacture is 10 cents or 40 cents and regardless of whether or not a processing tax is included in the cost of manufacture. It is impossible to say either that the processing tax has or has not been passed on.

The Congress has thus apparently imposed an impossible condition precedent to the obtaining of a refund of

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[4]For full text of this letter, see Appendix, p. 31.

[5]See E. R. A. Seligman, *The Shifting and Incidence of Taxation*, pp. 217-254.

[6]Footnote 1, p. 14.

unconstitutional or illegally collected processing taxes, and therefore equity should intervene and grant an injunction against the further collection of such taxes.

The Government may assert that section 21 (d) is not different from section 424 of the Revenue Act of 1928 and that the latter section was held constitutional in *United States* v. *Jefferson Electric Manufacturing Company.*[7] In that case, however, this Court said, in regard to the requirement that the manufacturer must show that he absorbed the tax in order to be entitled to a refund.

> "If the taxpayer has borne the burden of the tax, he readily can show it; * * *."

The statement of the Court was pertinent in every respect to the facts involved in the *Jefferson Electric Mfg. Co.* type of case. The tax therein involved was the automobile accessories tax and provided:[8]

> "Sec. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following **percentages of the price for which so sold** ~~or leased~~——
>
> "(3) Tires, inner tubes, parts or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;"

Patently, the tax involved in that case was fundamentally different from the processing tax. It was computed on the *sale price* of the article. If an article had a sale

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[7]291 U. S. 386.

[8]Sec. 900 (3), Revenue Act of 1918. See also sections 900 (3) and 600 (3) of the Revenue Acts of 1921 and 1924.

price of $10.00 the tax was 50 cents, and whether or not the tax was absorbed or passed was definitely determinable by whether the vendee paid $10.00 or $10.50.

An entirely different situation confronts the processing taxpayer for the tax is placed upon the initial step of manufacture and it is impossible to determine whether that **particular** cost of manufacture is included in the sale price of the article. In the President's Cabinet Committee Report on the Textile Industry[9] it is stated:

> "It is impossible to disentangle the effect of any individual element of cost upon selling price."

It is, therefore, submitted that because of the different factual situation involved, the case of *United States* v. *Jefferson Electric Mfg. Co.*, supra, cannot be considered as a precedent in determining whether the processor can or cannot prove that the tax has been passed on. Moreover, in that case the statute provided a procedure (viz., by filing a bond) whereby the tax could be recovered even though it had been passed on. (See section 424 (a) (3) Revenue Act 1928.) Further, the Court was not concerned in that case with the question of whether the remedy at law was adequate or whether equity might exercise its jurisdiction to enjoin the collection of the tax.

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[9]See Senate Document No. 126, 74th Congress, 1st Session—"A Report on the Conditions and Problems of the Cotton Textile Industry Made by the Cabinet Committee appointed by Him [the President]," p. 142 (August 25, 1935).

(3) There is no adequate remedy at law.

(A) *The Remedy at Law is not Plain, Certain and Clear. It is Obscure, Uncertain and Confused.*

Even assuming that Congress believed that there would be some possible way to prove that the processing taxes were not passed on, it is submitted that the remedy afforded by section 21(d) is so obscure, uncertain and confused that equity should exercise its jurisdiction to enjoin the collection of the tax.

Section 21(d) provides that a processor who seeks a refund of processing taxes must establish:

> "to the satisfaction of the Commissioner of Internal Revenue * * * that neither the claimant nor any person directly or indirectly under his control or having control over him, has"
>
> (a) Included the amount of the tax, directly or indirectly, in the price of the article,
> (b) Passed on any part of the tax for which a refund is claimed, to any other person in any manner,
> (c) Included the amount of the tax in the fee for processing,
> (d) Reduced the price paid the producer by the amount of the tax.

All four of the above elements must be established by the claimant to the *satisfaction* of the Commissioner. No standards are laid down in the Act by which the claimant can ascertain what proof will be sufficient to *satisfy* the Commissioner. Will it be sufficient if the claimant establishes that during the period in question his plant

was operated at a loss?[1] If operated at a profit, is he entitled to a reasonable return on his capital or will the presence of any profit, however small, require a conclusion that the tax has been passed on? Are costs and prices of varying periods to be used as the test? Must the claimant prove that any increase or decrease in the sale price of each article is more than offset by a corresponding increase or decrease in **net** manufacturing costs? If such is the type of proof required, must it be produced as to each sale, or as to the sales of each product, or as to the sales made during each month or other period of time?

It is at least patent that the cost of the auditing and accounting involved in such proof would, in many instances, be far in excess of the tax involved.[2]

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[1]Officials of the Bureau of Internal Revenue have advised that they do not consider such proof sufficient as it does not establish that the loss was caused *solely* by the processing tax. See also Senate Document No. 126, 74th Congress, 1st Session—"A Report on the Conditions and Problems of the Cotton Textile Industry, Made by the Cabinet Committee Appointed by Him [the President]," p. 141, (August 25, 1935), which states:

> "Profits or losses for individual processors are, however, in themselves no proof that the processing tax has been passed on."

[2]In *Burnet* v. *Houston*, 283 U. S. 223, relied upon below by the respondent, the taxpayer sought a deduction for a loss, the amount of which could not be fixed without proof of the March 1, 1913, value of the property sold. In the absence of such proof the Court could not determine whether or not the deduction claimed was legal and, accordingly, the Supreme Court decided against the taxpayer. In the present case, the illegality of the tax resulting from its unconstitutionality would require no proof. In the case cited the legality of the tax could not be determined without the proof.

A remedy at law that is so uncertain in its interpretation and which necessitates the expenditure of more money than the claim is worth in order to obtain a recovery, cannot be considered as a plain or certain remedy.

The statute also requires that this evidence must be presented at a hearing before the Commissioner of Internal Revenue. This would compel the taxpayer to bring all his books and records, his auditors and accountants, to Washington, in order to prove his case. It is not sufficient for the taxpayer to attempt to present this evidence *de novo* before the District Court in its own jurisdiction. The statute provides:

> "* * * In any judicial proceedings relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court."

The correct interpretation of the above quoted provision of the statute is obscure. Is it necessary to present the evidence on the entire case to the Commissioner or only the evidence on the question of whether or not the tax has not been passed on to the purchaser or back to the producer? Is the record so completed before the Commissioner conclusive? If not, how are exceptions thereto to be made and preserved? What rules of evidence shall govern the Commissioner?

Even more vital is the question of the right of the taxpayer to cross-examine witnesses and to have the right of a trial by jury guaranteed by the Seventh Amendment of the Constitution. The statute does not purport to give any protection of these fundamental rights and in this respect the procedure provided by section 21(d)

is fundamentally different from the remedies provided for the recovery of all other Federal taxes.

In the case of income, estate and gift taxes the taxpayer can elect either to test the deficiency in tax before payment thereof before the Board of Tax Appeals and the Courts or to pay the tax and sue in the District Court or Court of Claims in a trial *de novo*. In the case of all other taxes except the processing tax the taxpayer, after paying the tax, has the right of a trial *de novo* before either the District Court or the Court of Claims. In the case of the processing tax, on the contrary, no trial before the Board of Tax Appeals and no trial *de novo* in the Courts is afforded the taxpayer. The members of the House Conference Committee[3] explained section 21(d) in the Conference Report, as follows:

> "No trial *de novo* on the facts by the Court is provided for as is provided in the Senate amendment, nor can judicial proceedings be brought in the absence of the prior administrative hearing and record."

In litigating any other tax the taxpayer has the right to cross-examine the defendant's witnesses. The present statute does not provide for cross-examination of the witnesses produced by the Commissioner of Internal Revenue. Conceivably, and probably,[4] the Commissioner would place some of his evidence in the record *ex parte*

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[3]House Report No. 1757, 74th Congress, 1st Session, p. 32.

[4]Those familiar with the procedure in the Bureau of Internal Revenue in applying the relief provisions of section 210 of the Revenue Act of 1917 and sections 327 and 328 of the Revenue Acts of 1918 and 1921 well know that even though the taxpayer proved an abnormality in his income and thus became

and the taxpayer would not have a chance to test its truth or accuracy.

In addition, the taxpayer, if he desires to use it, has a common law right of action against the collector of internal revenue as an individual.[5] The taxpayer, in such action, is entitled to a jury trial which necessarily implies the right to have the jury hear the evidence and observe the conduct of the witnesses.[6] Such procedure is of necessity impossible under section 21(d). It cannot therefore be said that the taxpayer has an adequate remedy at law, or a right to resort to all the procedural protection to which he is entitled under the law.

Striking analogies exist between the facts of decided cases where the courts have exercised their equitable

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entitled to "special assessment" still the taxpayer was never given an opportunity to examine the Commissioner's files so that he could determine whether proper comparative rates were applied to his case.

[5]See *Penn Bros* v. *Glenn*, 10 Fed. Supp. 483, for a review of the decisions establishing the right to sue the collector at common law.

[6]*Francis* v. *Baker*, 11 R. I. 103.
Plimpton v. *Somerset*, 33 Vt. 283.
Cutler & Hinds v. *Richley*, 151 Pa. 195, 25 A. 96.
Wilson v. *York Tp.*, 43 S. C. 299, 215 E. 82.
De Walt v. *Kinard*, 19 S. C. 286.
Untermeyer v. *Bernhauer*, 105 N. Y. 521, 11 N. E. 847.
Climax Road Mach. Co. v. *Central Bank of Medina*, 156 N. Y. S. 854.
The implication of the dicta in *Wickwire* v. *Reinecke*, 275 U. S. 101, is not supported by authority or principle and is contrary to those decisions which hold that the action against the Collector to recover taxes arises out of the common law and not under any statute.

powers and the factual situation involved in the present case. In *Neild Manufacturing Corporation* v. *Thomas B. Hassett*,[7] the Court, in granting the temporary injunction against the collection of processing taxes, said:

> "This statute (R. S. 3224) applies to proceedings to enjoin the collection of taxes predicated upon the ground that they are illegal or unconstitutional, unless it is also made to appear 'that the enforcement of the tax would cause irreparable injury, or that there are other special circumstances bringing the case under some recognized head of equity jurisdiction, * * *' Henrietta Mills v. Rutherford Co., 281 U. S. 121, 124.
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> **"Uncertainity respecting the ability of the taxpayer to satisfy his claim if he pursued his remedy at law has been deemed sufficient to bring the case within the equity jurisdiction.** Stewart Dry Goods Co. v. Lewis, 287 U. S. 9; compare Wilson v. Illinois Southern Ry. Co., 263 U. S. 574; Atlantic Coastline v. Daughton, 262 U. S. 413."

In the case of *David* v. *Wakelee*,[8] in which the question was raised as to whether or not a court of equity could take jurisdiction over a suit to enjoin the assertion of a specified defense to an action on a note, the Court said:

> In the uncertainty which appears to exist in that State, as to whether a complaint setting forth all the facts would or would not be demurrable, we think it may be fairly said that the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction. **It is a settled principle of equity jurisprudence, that if a remedy at law be doubtful, a court of equity will not decline cognizance of the suit.** [Citing cases.] **Where equity can give relief plaintiff**

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[7] 11 Fed Supp. 642.

[8] 156 U. S. 680 and 688.

ought not to be compelled to speculate upon the chance of his obtaining relief at law."

In *Union Pacific R. R. Co.* v. *Board of County Commissioners,*[9] a case to enjoin the collection of taxes, the statute originally involved afforded a complete and adequate remedy at law. Thereafter, amendatory legislation was passed which cast doubt upon the adequacy of the remedy at law. The Court said:

> "An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. The question is purely one of State law, and, so far as we are advised, the Supreme Court of the State has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. **In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain.** And this being so, the situation is not one in which cognizance of the present suit properly can be declined."

In *Wilson* v. *Illinois Southern Railway Co. et al.,*[1] the remedy at law for recovery of illegal taxes provided for an appeal from the Commission to the Court "upon a record of the evidence and proceedings before it prepared by the Commission with a further appeal to the Supreme Court." This Court said:

> "How far such an appeal would be adequate upon a charge of fraud against the Commission may be doubted, and **the adequacy of a remedy at law must be clear."**

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[9]247 U. S. 282 at 287.

[1]263 U. S. 574, 577.

As illustrating the fact that equity will also intervene in cases where the remedy at law will involve needless expense, attention is called to the case of *Atchison, Topeka and Santa Fe Railway Co.* v. *Sullivan*,[2] where the court enjoined the collection of taxes. The court said:

> " * * * The adequate remedy at law which will deprive a court of equity of jurisprudence is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. [Citations.] The facts and the law of this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has and it is entitled to keep the $3,580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it, and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this $3,580 to the defendant, must bring, try, and prosecute to judgment an action at law against the county to recover it back, must possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for a mandamus to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. This proposed remedy is neither as prompt, nor as certain, nor as complete, as the relief which may be granted through this suit in equity."

It is patent that the remedy provided for by section 21(d) of the Agricultural Adjustment Act, as amended, is uncertain, confusing, complicated, and needlessly expensive. The cited cases clearly cover such a situation and

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[2] 173 Fed. 456, 470 (C.C.A.—8th).

it is, therefore, submitted that equity should intervene and preserve for the processors a plain, certain, and clear remedy for the protection of their constitutional rights.

(B) *The Remedy at Law is not Complete. It will Cause Irreparable Injury and Multiplicity of Suits.*

In addition to the fact that the remedy at law provided for by section 21 (d) **is not plain, certain, or clear,** which in itself is sufficient grounds for granting an injunction, it is submitted that the **remedy at law is not complete.**

The statute provides that the processor can obtain a refund only if he can prove that he has not passed the tax on to his vendee, or back to his vendor. If this fact cannot be proved, neither the processor, his vendee nor any subsequent purchaser may recover this unconstitutional exaction, but the Government retains the amount so exacted. The result has been that in many sections of the country the vendees are threatening litigation with the processors to reduce contract prices by an amount equal to the tax, although the processor may already have paid it. The processor cannot afford to have an amount equal to the tax withheld by the purchaser, and at the same time continue to pay the tax to the United States and run the risk of attempting to obtain a refund thereof in the distant future. This, in effect, would require him to pay the same tax twice. There is no escape from the horns of this dilemna, and the taxpayers generally are suffering irreparable injury in innumerable cases.[3]

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[3]In *John A. Gebelein, Inc.* v. *Milbourne,* 12 Fed. Supp. 105 at 110, the Court said:

"Again, I cannot on the facts adopt the view contended for that the imposition of the tax is not a very serious bur-

Furthermore, the economic law of diminishing returns clearly applies in the present type of case. As the price of the goods is forced higher and higher by the increase in the cost thereof occasioned in turn by the reduction in the production of cotton and the imposition of the processing tax, the volume of sales of the manufacturer is decreased. The Court is familiar with the consumers' strikes that have been springing up throughout the country in protest of the rise in meat prices, and a similar situation confronts the cotton manufacturer. This is established in the case of cotton by the recent Cabinet Report on the Cotton Textile Industry, wherein it was stated:[4]

> "In so far as the prices of cotton textiles have been increased in consequence of the processing tax, sales have been to some extent reduced below what they

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den on the plaintiff or that its financial difficulties are due mainly to causes unrelated to conditions brought about by the policy pursued under the Act. * * * Since the Act has been in effect a successful business has been converted into a losing one, the operating losses before depreciation but after payment of salary in 1934 being about $15,000 and in the four months of 1935 being about $12,000. I am satisfied these losses are due principally, if not wholly, to the incidence of the tax and the conditions in the business brought about by the policy pursued under the Act. * * * Nor are the recent losses peculiar to the plaintiff but, as is shown by the testimony, have similarly affected a number of other Baltimore packers. I do not, therefore, find that the plaintiff's present financial condition is due to causes unrelated to the Act."

[4]Senate Document No. 126, 74th Congress, 1st Session—"A Report on the Conditions and Problems of the Cotton Textile Industry Made by the Cabinet Committee Appointed by Him [the President]," p. 141 (August 25, 1935).

would have been in the absence of the tax as an element of cost."

The effect of the Agricultural Adjustment Act on the cotton textile industry as a result of the increased cost of cotton products occasioned by the reduction in production of the raw material and the imposition of the processing tax is well illustrated by the figures showing the United States consumption of cotton.[5]

August 1, 1932, to July 31, 1933 ..... 6,137,000 bales
August 1, 1933 to July 31, 1934 ..... 5,700,000 bales
August 1, 1934 to July 31, 1935 ..... 5,360,000 bales

The processing tax was effective from August 1, 1933.

The effect of this decrease in sales of cotton textile products on the processors is emphasized by the data set out in the report of the Federal Trade Commission on Textile Industries,[6] in which is listed the rates of return on investment of numerous textile concerns. The rate of return for 84 companies engaged in spinning cotton yarns is illustrative:

Rate of Return	*Jan.-June, 1933* Percent	*July-Dec., 1933* Percent	*Jan.-June, 1934* Percent	*July-Aug., 1934* Percent
1. On average total investment	2.38	7.94	4.04	(0.61) Loss
2. On average total investment in textile business	2.25	8.55	4.21	(2.48) Loss
3. On average total capital-stock equity in textile business	1.43	8.97	3.84	(3.67) Loss

[5]Yearbook of Agriculture, 1935, p. 435, for years 1932-1933, and 1933-1934. For 1934 to 1935, Department of Agriculture Bureau of Agricultural Economics, Report on Acreage, Production, Carry-over, Supply and Consumption of Cotton, Table 8.

[6]Part II, Investment & Profit, Dec. 31, 1934, pp. 31-34. The same report establishes that except for the cost of raw material and the processing tax other costs remained almost constant, pp. 5, 6, et seq.

Comprehensive studies of the effect of the increased prices of basic agricultural commodities and corresponding decrease in consumer sales on the processor have not been conducted by any governmental agency. It is known, however, that as prices increased, consumption has materially decreased with respect to most basic agricultural commodities, until the low points in per capita consumption of pork, wheat, corn and cotton were reached in 1934 and 1935, as disclosed by statistics of the Department of Agriculture. Regardless of the financial effect on the processor, it is patent that he is losing sales daily. This loss in sales is a serious and irreparable injury which cannot be compensated for, even if a practical and efficacious means of obtaining a refund of this unconstitutional exaction were provided by law.

Not only is the remedy at law incomplete because of the irreparable injury that will ensue to the processor if it should attempt that remedy, but it is also incomplete because it will lead to a multiplicity of suits. If the purchasers deduct from their invoices the amount of the processing tax involved therein, the processors necessarily must sue each separate purchaser for the amount of the deduction. The number of suits involved would be countless, as each processor probably sells to hundreds of jobbers.

Furthermore, each time a processing tax is paid, a new cause of action arises. In view of the uncertainty of the meaning and interpretation of section 21(d), it is imperative that the taxpayer promptly file its refund claim as each tax is paid. Also, in view of the uncertainty as to the type of restrictive legislation future Congresses may pass in the event the Agricultural Adjustment Act is declared unconstitutional, taxpayers cannot safely wait to bring suits until claims covering several months' taxes

have accrued. Furthermore, many processors have large amounts of working capital tied up in processing tax payments and cannot afford to wait until numerous causes of action accrue and combine them in one suit. Such procedure will necessitate innumerable suits, protracted litigation and great expense to the taxpayer, the Government, and the courts.

In *Luer Packing Company* v. *Nat Rogan* (decided by the District Court of the United States for the Southern District of California, Southern Division, on July 27, 1935), Judge James said in granting a temporary injunction against the collection of processing taxes:

> "* * * The Court also concludes that the facts alleged show unusual and exceptional conditions warranting the issuance of an injunction, **exclusive of any consideration of the fact that Congressional action is threatened which may deprive the plaintiff of any right of action at law,** as to which allegation of fact it is believed the Court can give small weight because of its speculative and conjectural character. It is concluded that because of the serious doubt as to the constitutionality of the law, together with the fact that a multiplicity of suits must inevitably result (necessary to be brought by the plaintiff if it is relegated to its remedy at law to protect its rights) injunction should issue, as was held proper under similar findings in Lee v. Bicknell, 292 U. S. 415-421."

The present situation is similar to cases where it has been claimed that a bond is invalid. The remedy at law would require a suit on each interest coupon as it came due and was not paid. In *Thompson* v. *Emmett Irrigation District,*[7] the Court said:

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[7]227 F. 560, 567 (C. C. A.—9th). See also: *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 12, where the Supreme Court said:

"Where irreparable injury is threatened, or the damage

> " * * * In this situation, the present suit in equity will be practical, efficient, and prompt in determining once and for all the validity or invalidity of the bonds and coupons attached thereto, and it is manifest that a multiplicity of suits at law upon the coupons as they become due, the only present remedy at law, cannot afford such a practical and efficient result in the administration of justice."

It is, therefore, submitted that since the remedy at law afforded by section 21(d) will not prevent needless multiplicity of suits it is not adequate. Further, to pursue the remedy at law will cause all processors irreparable injury through the loss of sales and good will.

(C) *The Remedy at Law is not Prompt . It is Protracted and Dilatory.*

An analysis of section 21(d) shows that it provides for a procedure that is fraught with delays. Section 21(d) (2) provides:

> " * * * no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

Section 3226 of the Revised Statutes has been on the Statute Books since February 27, 1877. Since its incep-

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be of such a nature that it cannot be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction."

See also: *Wiemer* v. *Louisville Water Co.*, 130 Fed. 246.

tion this statute has always provided that if the Commissmissioner of Internal Revenue does not act upon a claim for refund within six months after the filing thereof, the taxpayer may institute his proceeding in court. No explanation of the change in this 60-year-old rule in procedure was made in any of the Congressional reports. It is submitted that it would seem that the deliberate purpose of the amendment is to delay judicial action on the taxpayer's claim.

In this connection it should be further noted that while the taxpayer is permitted to bring suit in court one year after the claim is filed, there is no limit placed upon the time for the Commissioner to hold his hearing, and make his finding as to whether or not the tax has been passed on. This hearing and finding must take place under the statute after the claim has been filed, and the record before the Commissioner is a necessary part of the court record.

To illustrate that section 21(d) does not provide an adequate remedy, by reason of the delay involved in its operation, we submit the following hypothetical case. A taxpayer files his claim after having paid the tax. The Commissioner rejects the claim as he has already done with thousands of others. Either before or after the rejection of the claim the taxpayer asks the Commissioner for a hearing in order to prove that the tax has not been passed on, so that the Commissioner may certify that fact to the Court for the purpose of trial. The Commissioner for one reason or another delays the hearing for a period of two years. It then is apparent that the taxpayer is barred by the statute of limitations from instituting his suit. If he does institute his suit within that period, the

Commissioner refuses a hearing, making it impossible to complete the record in the District Court.[8]

Even if the Commissioner should attempt all possible expedition it is apparent that it will take years to hold hearings and make findings. The procedure provided for by the statute necessarily concentrates in one administrative officer judicial functions which heretofore have been divided among the District Courts throughout the United States.

It is apparent that the procedure required by section 21(d) not only is burdened with delays, but that the remedy is solely within the control of the opposite party. The Commissioner of Internal Revenue is the sole judge of "when, where, and how" the procedure under section 21(d) shall take place.

The courts have long recognized the principle that where the remedy at law is within the control of the defendant equity will exercise its jurisdiction in order that the dispute may promptly be settled.

The language of the Court in *Fredenberg* v. *Whitney*,[9] is particularly apposite on this point. The Court said in overruling the defense that there was an adaquate remedy at law:

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[8]With a view to testing the constitutionality and construction of section 21(d), counsel, in one of their cases, requested a hearing before the Commissioner. The Commissioner wrote in reply:

> "In reply you are advised that the claims in question have been rejected in full and the claimant advised of the action taken. Since, at the time of action on these claims they were disposed of in accordance with the provisions of existing law, and the cases are closed, there does not appear to be any reason why a hearing should be granted this claimant under the provisions of section 21(d) of the Agricultural Adjustment Act, as amended."

[9]240 Fed. 819, 822. See also *German-American Inv. Co.* v. *City* of Youngstown, 68 Fed. 452.

"The legal remedy, if any, which could be asserted when formal action is entered to recover the penalty, is a remedy which rests solely in the will of the government. No action has been instituted. Demand has been made. When action will be instituted, and opportunity to make legal defense afforded, rests solely with the discretion of the public officials. 'Adequate remedy at law,' in Wheeler v. Bidford, 54 Conn. 244, 7 Atl. 22, is said to be a remedy vested in the complainant, to which he may at all times resort at his own option, fully and freely, without let or hindrance; and in Bank v. Stone, (C. C.) 88 Fed. 383, at page 397, the court said:

" 'It would seem clear that a court of equity will not withhold relief from a suitor **merely because he may have an adequate remedy at law if his adversary chooses to give it to him. A remedy at law cannot be adequate, if its adequacy depends upon the will of the opposing party.**' * * * In these days of industrial expansion, parties should have a right to have any issue which involves their financial status speedily adjusted, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the party himself controls and can assert at the moment. When there is a doubt in the mind of the chancellor as to the adequacy of the remedy that doubt should be resolved in favor of the petitioners. Simpkins, Equity Suit, p. 25; Rumbarger v. Yokum (C. C.) 174 Fed. 55."

It is patent that the remedy provided for by section 21(d) is protracted, dilatory and vexatious. Accordingly, equity should exercise its jurisdiction to expedite the settlement of the litigation.

Conclusion

It is submitted that, assuming that the Agricultural Adjustment Act, as amended, is unconstitutional, and that the Courts have jurisdiction to entertain a suit in equity, this Court should enjoin the further collection of processing taxes.

Respectfully submitted,

JAMES S. Y. IVINS,
KINGMAN BREWSTER,

Of Counsel:

PERCY W. PHILLIPS,
O. R. FOLSOM-JONES,
RICHARD B. BARKER,
JOHN WARD CUTLER.

APPENDIX

TREASURY DEPARTMENT

WASHINGTON

MT-PT:C September 25, 1934.

Mr. W. Ray Bell,
The Association of Cotton Textile
Merchants of New York,
40 Worth Street,
New York City, New York.

Sir:

Reference is made to your letter of August 31, 1934, in which you advise this office that certain states, particularly the State of New Jersey, have deducted from their remittances covering invoices for cotton fabrics and other cotton articles the amount of the enhancement of the price incident to the processing tax imposed under the Agricultural Adjustment Act. You state that you cannot legally sue the state and request to be advised what steps you should take in order to meet the situation. You suggest the possibility that the regulations of this Department could be amended so as to provide for refunds of taxes paid with respect to articles delivered to any sovereign state.

In reply you are advised that article 9(2) (b) of Regulations 81 provides in part that processing for, or for sale to, the United States, a State, a Territory, or a possession, is subject to the tax, whether or not the commodity or the product derived from the commodity, is owned by the United States, such State, such Territory, or such possession.

The processing tax attaches upon the first domestic

processing of cotton and is payable by the processor. The amount paid as tax with respect to such commodity increases the cost of conducting his business and becomes an indivisible part of the production cost, similar to the manner in which other expenses such as depreciation, interest on capital invested and taxes paid to the state, are incident to the conduct of a manufacturing business and enhance the cost of articles produced The processing tax cannot be considered as a tax with respect to any person other than the person liable to the Government for the tax.

The addition to the net sale price of an article sold to the State of New Jersey, of an amount equal to the processing tax paid with respect to such article cannot properly be said to be an addition of the processing tax to such price, but is a procedure resorted to by the vendor to designate the proportionate amount of the gross sales price which was expended as a production cost incident to the processing tax and to explain the resulting increment in such gross sales price.

There are no provisions in the law on which to base an amendment to the regulations providing for refund of taxes paid with respect to articles delivered to a sovereign state, except where the articles are delivered for charitable distribution or use or for the use of an organization engaged in welfare work. Therefore, the matter does not come within the jurisdiction of this Bureau but is a matter to be adjusted between the parties concerned.

Respectfully,

D. S. Bliss,
Deputy Commissioner.

cc Collector,
. Customhouse,
New York, New York.